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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-193

FRED G. MORITT,

Petitioner,

-against-

MAURICE H. NADJARI, KENNETH R. WOLFE, WILLIAM FEDERICI, JOSEPH MULLIN, JAMES HIGGINS, ADAM BUTCHER, JULES SACHSON, HYMAN LIPSON, JOSEPH HIRSCHMAN, person intended being the Foreman of the Grand Jury, "JANE ROE," person intended being the Secretary of the said Grand Jury, EUGENE GOLD and NICHOLAS SCOPPETTA,

Respondents,

SAM ROBERTS and NEW YORK NEWS, INC.,

Defendants.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

In opposition to the petition for certiorari, the Respondents Nadjari, Wolfe, Federici, Hirschman, and "Roe,"* contend that "most of Moritt's claims of

*The respondents Gold and Scoppetta have filed no response in opposition to the petition for certiorari.

misconduct, i.e., suppression of evidence, forgery, use of misleading evidence, improper legal instructions to the grand jury, have been, in one form or another, decided against him. See, e.g. *Moritt v. Nadjari*, 46 A.D.2d 784 (2d Dept. 1974); *Matter of Moritt v. Extraordinary Special and Trial Term of Supreme Court of Kings County*, 46 A.D.2d 1012 (2d Dept. 1974) appeal dismissed, 36 NY 2d 911 (1975), leave to appeal denied, 37 NY 2d 707 (1975), appeal dismissed, ——U.S.——, 96 S.Ct. 557 (1975)". (Resp. Br. p. 11).

In reply, we respectfully invite the Court's attention to the fact that at no time had Petitioner been granted an evidentiary hearing, *on the merits*, by the state courts on the crucial issues of wilful suppression of vital exculpatory evidence, the wrongful use of misleading evidence, or the deliberate thwarting of the Petitioner's absolute right to effect a citizens' arrest of the Respondents Nadjari and Wolfe, based upon conceded probable cause, for the serious crimes committed by them against Petitioner prior to and throughout the course of the grand jury proceedings.

Indeed, in the very brief submitted by the Respondent Nadjari to this Honorable Court in *Moritt v. Extraordinary Special and Trial Term of Supreme Court, supra*, under Docket No. 75-648, p. 13 ff. he flatly conceded and acknowledged to this Court, as follows:

> "The question of alleged prosecutorial misconduct was not presented to the Appellate Division in the instant prohibition proceeding. Indeed, under state law, appellant would have been unable to raise the issue on a petition for a writ of prohibition. See note, p. 14, infra. *The question of prosecutorial misconduct remains to be resolved in the trial court.*" (emphasis added).

II

Again, in a patently unsupportable attempt to equate the special factual pattern of *Imbler v. Pachtman*, 96 S.Ct. 984, with the extremely gross prosecutorial misconduct portrayed at bar, the Respondents represent to this Honorable Court that the Petitioner's arrest "pursuant to a court-ordered bench warrant was automatically immunized as an act carried out under a court directive." [*Resp.Br.-p.10*]. The fact is, however, that the Petitioner's arrest, and the bench warrant issued thereunder, without probable cause therefor, had been wrongfully and maliciously instigated and procured by the Respondents in a nefarious conspiracy to sabotage the Petitioner's right to effect the Respondents' arrest for the sundry serious crimes committed by them, as aforestated. (*App.p.27a*]. It is significant, in this connection, to note that the Respondents failed to file any indictment against Petitioner until April 17, 1974, coincidentally the very day that the latter unsuccessfully sought the arrest of the Respondents Nadjari and Wolfe for the criminal acts committed by them. The Petitioner had, in fact, petitioned the Governor to investigate the Respondent Nadjari's misconduct as early as April 8, 1974, and on April 10, 1974 had laid his evidence before the District Attorney of Kings County, which went unheeded and as a result, the Respondent obtained the "quickie" indictment against him.

III

The Respondents have failed in any way to controvert the Petitioner's contention that the Court of Appeals erred in applying the *Imbler* holding, which accorded absolute immunity to state prosecutors, equally to the Respondent Federici, an employee of the Respondent Nadjari. [*Pet. pp. 13-14*]. It was clearly never the holding nor the intention of

the Supreme Court to grant absolute immunity to a prosecutor's press agent, loaned to the Respondent Nadjari by the Daily News, a co-defendant in this case.

IV

In opposition to the petition for grant of certiorari herein, the Respondents now assert that the civil rights action instituted by the Petitioner should await the outcome of the pending state criminal prosecution. (*Resp. Br. Point II*), citing *Martin v. Merola,* 532 F.2d 191 (CA 2, 1976).

We respectfully submit, in reply, that the pivotal question presented by the decision of the United States Court of Appeals below dwelt essentially on the issue of prosecutorial immunity. Accordingly, *Martin v. Merola, supra,* cited by the Respondents, should not foreclose this Honorable Court from presently determining the propriety of the ruling below that the Respondents were entitled to absolute immunity under the extraordinary factual pattern at bar.

In any event, it should be noted that the holding in *Martin v. Merola* should be strictly limited to its own facts centering on a prosecutor's prejudicial dissemination of news releases and its impact on a defendant's right to a fair trial. Such an issue may indeed properly await the outcome of a criminal trial, in order to determine whether the defendant had been prejudiced thereby. Here, however, altogether different is the wilful suppression of vital exculpatory evidence, as alleged in the complaint at bar, which is inherently prejudicial and ought not be made to depend upon the outcome of a criminal trial in order to assess or consider its fundamental impact upon the defendant's right to a fair trial.

V

Compounding the allegations of gross prosecutorial misconduct systematically practiced by the Respondents at bar, we respectfully call the Court's attention to the recent decision of the Appellate Division of the Supreme Court, Second Judicial Department, dated August 11, 1976, *In the Matter of Fred G. Moritt Petitioner, v. Maurice H. Nadjari, Deputy Attorney General, et al., respondents.* finally declaring that the Respondent was utterly without jurisdiction to *investigate* or prosecute the indictment against Petitioner. In its holding that the Respondent usurped jurisdiction, the Appellate Division definitively stated:

> "In light of the recent decision of the Court of Appeals in *Matter of Dondi v. Jones* (——NY 2d——, dec. June 3, 1976), mot. for rearg. den. —— NY 2d—— July 6, 1976), which held that the superseding jurisdiction of the Special Prosecutor under the Executive Order in question is to be confined strictly to the criminal justice process or system, it is clear that the indictment should be prosecuted by the District Attorney of Kings County since the acts charged do not relate to the criminal justice process or system."

In this connection, it is inexplicable that the Respondents' Brief has completely ignored the decision of the highest court, the New York Court of Appeals, in the *Dondi* case *supra,* as a result of which *Moritt v. Nadjari,* 46 AD 2d 784, cited in Respondents' brief, pp. 4, 13, was rendered obsolete as aforenoted.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: September 29, 1976.

Respectfully submitted,

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